Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

APPOLO FUELS, INC.,

Petitioner,

v.

BRUCE BABBITT, SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR; OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, U.S. DEPARTMENT OF THE INTERIOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Surface Mining Control and Reclamation Act of 1977 established a comprehensive set of standards for reclamation of surface coal mines. Among these is the requirement that the operator of a contour surface mine in a mountainous area, after initially removing the earth (overburden) to recover coal, backfill this material against the highwall, and grade it to achieve the "approximate original contour . . . with all highwalls eliminated". After this standard is achieved by the operator, it is not uncommon for a small amount of the highwall to become re-exposed due to the settlement, or consolidation, of the earthen fill material. The legislative history of the Act reveals that Congress intentionally did not impose upon operators any of the standard methods which could be employed to control or reduce such settlement; nor do the regulatory agencies require these in the mine permitting process or during reclamation operations (OSM considered, then abandoned the idea in 1990). Both OSM and the state regulatory agencies charged with implementing the Act have tolerated this minor highwall re-exposure in varying degrees. Yet the "official" position of OSM is that no post-reclamation settlement is ever allowed, which position is supported by several administrative decisions of the Interior Board of Land Appeals. It is these administrative decisions which were upheld by the Court of Appeals, and which Petitioner seeks to have examined and overturned.

Moreover, the regulators have acted on this issue pursuant to a series of unpublished, internally promulgated "enforcement policies" with the result that the same condition may or may not constitute a violation, depending upon the location of the mine, the time of inspection and the

enforcement policy then in effect. In the present case, a state proceeding initiated in 1990 ultimately determined that no violation existed on Appolo's permit, but the instant action by OSM reached the opposite result.

The question presented is whether the Surface Mining Control and Reclamation Act of 1977 contemplates regrading to eliminate small highwalls created from fill settlement, after reclamation and re-vegetation is once successfully completed.

Also at issue is whether OSM's arbitrary and selective enforcement of the highwall elimination standard violated Appolo's right of Due Process as guaranteed under the United States Constitution.

The third issue is whether the administrative decision reached in the state proceeding should have precluded further action by OSM.

STATEMENT PURSUANT TO RULE 29.6

The Petitioner, Appolo Fuels, Inc., states that it has no corporate parent, and that no publicly held company owns 10% or more of Appolo Fuels, Inc., stock.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	iii
Table of Contents	iv
Table of Cited Authorities	vi
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	1
Reasons for Granting the Writ	14
I. The Court Of Appeals Ruling Perpetuates An Erroneous Interpretation Of SmCRA Which Adversely Impacts A Major Portion Of The Nation's Coal Industry.	14
II. The Inconsistent And Irrational "Enforcement Policies" Applied By OSM Have Created A Breach Of Due Process Warranting Intervention By This Court.	17

Contents

Page

III. Due Process Demands That OSM Respect Results Of Litigation In An Approved State Administrative Review Process. 19

Conclusion 20

TABLE OF CITED AUTHORITIES

Page

Cases:

In Re: Permanent Surface Mining Regulatory Litigation, 653 F.2d 514 (D.C. Cir. 1981) 19

Motor Vehicle Manufacturers Association v. State Farm, 463 U.S. 29 (1983) 18

National Wildlife Federation v. Mary Helen Miller, Secretary Natural Resources Environmental Protection Cabinet, et al., Civil Action No. 86-99 9

River Processing, Inc., v. OSM, 76 IBLA 129 (1983) 6, 8, 14, 15, 16

Statutes:

28 U.S.C. 1254(1) 1

30 U.S.C. § 1201, *et seq.* 1, 2

30 U.S.C. § 1258 7

30 U.S.C. § 1260 7

30 U.S.C. § 1265(b)(3) 3

30 U.S.C § 1265(d)(2) 3

30 U.S.C. § 1271 7

30 U.S.C. § 1276(a)(1) 18

Cited Authorities

Page

Other Authorities:

53 FR 26728 (July 14, 1988) 19

53 FR 26731 (July 14, 1988) 19

55 FR 14319 (April 17, 1990) 7, 16

55 FR 14319 14321 16

56 FR 17480 (April 22, 1991) 7

H.R. Rep. 95-218 4

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Sixth Circuit Dated, Decided And Filed October 24, 2001 ..... 1a

Appendix B — Memorandum Opinion, Order And Judgment Of The United States District Court For The Eastern District Of Kentucky, London Division Dated And Filed February 24, 2000 ..... 14a

Appendix C — Opinion Of The United States Department Of The Interior Dated And Decided May 28, 1998 ..... 33a

Appendix D — Relevant Statute And Legislative Material 43a

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The District Court's opinion (per Johnson, Magistrate Judge) granting Respondents' Summary Judgment motion is unpublished. The Court of Appeals opinion (per Daughtrey, J., joined by Gilman and Weber, J.J.) affirming (Pet. App. 1a) is published at 270 Fed. 3d 333.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion on October 24, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Surface Mine Control and Reclamation Act of 1977, 30 U.S.C. § 1201, *et seq.*, relevant to this petition are reprinted in the Appendix at 43a.

STATEMENT OF THE CASE

Appolo Fuels, Inc., ("Appolo") is a medium-sized coal company producing approximately two million tons of coal per year from operations which straddle the Kentucky-Tennessee border near Cumberland Gap, Tennessee, and Middlesboro, Kentucky. The Office of Surface Mine Reclamation and Enforcement ("OSM") of the United States Department of Interior is the agency created by Congress to regulate surface coal mining pursuant to the provisions of

the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201, *et seq.* ("SMCRA" or the "Act"). OSM has direct enforcement authority for surface mining operations within the state of Tennessee, while in the Commonwealth of Kentucky, primary jurisdiction has been delegated to the State Department for Surface Mine Reclamation and Enforcement ("DSMRE"), subject to limited statutory oversight jurisdiction retained by OSM. Appolo has operated on more than forty surface mining permits issued by OSM and DSMRE, and has received recognition from both agencies for outstanding surface mine reclamation.

1. A correct interpretation of SMCRA requires understanding of the conventional strip mining practices as they existed in Appalachia prior to 1977, and the environmental problems thereby caused. Strip mining in the mountains typically involves a contour cut along the side of a mountain whereby the layers of rock and dirt above the coal seam are blasted and removed, leaving a shear rock wall, similar to the rock cuts commonly seen along interstate highways. In "pre-law" mining, the material which was removed ("overburden" or "spoil") was pushed over the side of the mountain below the level of the coal seam and then graded outward to create more working area. A relatively flat "bench" was thus created, consisting in part of solid material directly underlying the coal and the loose spoil material which had been shoved over the bank and graded to extend the bench outward. This latter area was called a "fill-bench". This practice of dumping loose overburden over the side of the mountain below the mine was the source of most, if not all, of the environmental problems associated with pre-law strip mining. The fill-bench was typically not stable, and was subject to slides and erosion, which resulted

in significant sedimentation of streams as well as other problems. None of these problems were associated directly with the existence of the exposed highwall which is merely a rock face not unlike exposed rock outcrop found naturally throughout Appalachian Mountains or those highwalls which are a permanent feature of highway construction.

Perhaps the central and most controversial provision of SMCRA was the requirement of backfilling spoil material against the highwall to the "approximate original contour" ("AOC"). The central debate in Congress was whether backfilling and grading spoil to the top of the highwall was practical or feasible. Opponents argued for exceptions to the complete highwall elimination requirement where it was shown to be infeasible or a lesser requirement of partially covering the wall to within thirty feet or so, in order that trees would cover it in a few years. In the end, Congress opted for "complete" highwall elimination, utilizing all available spoil for that purpose, with no spoil dumped on the out-slope below the bench. Any excess spoil material must be placed in engineered fills for permanent storage ("hollow-fills"). The Act explicitly requires that the backfill have long term stability, 30 U.S.C § 1265(d)(2). However, the question of normal settlement or consolidation of the fill material (which normally increases stability) was not addressed by any performance standard included in the Act. Compaction of fill material (which would be the primary means of reducing future settlement) is not required except "where advisable to insure stability or to prevent leaching of toxic materials", 30 U.S.C. § 1265(b)(3), Pet App. 43a[1]. In contrast,

1. Engineering studies performed after enactment of SMCRA, and accepted by both OSM and DSMRE, demonstrate that compaction is not necessary to achieve stability in mine spoil backfill scenarios. (Cont'd)

precise and strict performance standards were included to address settlement of earthen materials in other components of the mining and reclamation process, to wit: construction of earthen dam sediment structures (ponds), permanent spoil storage facilities (hollow-fills) and coal refuse disposal sites. Moreover, H.R. Rep. 95-218 (Pet. App. 43a) makes explicit reference to the necessity of "controlled placement and compaction of spoil" to reduce or control anticipated settling where the post-mining land use will include residential, commercial or other building development. Thus, it is apparent that the Congress intentionally did not require that the operator take any measure to address the future settlement or consolidation of the material backfilled against highwalls, even though this necessarily would re-expose some portion of the highwall over time.

In the instant case, DSMRE approved Appolo's mine and reclamation plan for a very large, multi-seam, multi-contour surface mining operation in Bell County, Kentucky, which included two separate, stair-stepped highwalls each in the range of 110 to 140 feet in height. Although the approved permit included a detailed backfilling and grading plan for achievement of AOC, there were no measures included to address future settlement of the fill. Appolo completed the mining and reclamation between 1985 and 1988. During this period, Appolo blasted, removed, backfilled and re-graded approximately 10 million cubic yards of earthen material, all in accord with the approved permit plan. The method of construction was inspected monthly by DSMRE and

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(Cont'd)

Accordingly, compaction *per se* is not normally employed in operations conducted under the Act. As OSM acknowledged in the 1990 rule making, backfilling can be achieved in a single lift (i.e., back-dumped), if stability is certified.

periodically by OSM. No violations were ever written, nor was any other enforcement action taken, with regard to the method of construction the backfill. Appolo did not depart from the SMCRA performance standards or its permit in any way, in terms of backfilling and grading. On March 1, 1989, DSMRE certified that backfilling, grading and initial vegetation of the site had been successfully accomplished, with all highwalls completely eliminated, releasing sixty percent of Appolo's performance bonds on the site.

By 1990, the fill had settled more or less uniformly along the eleven thousand linear feet of contour, re-exposing highwall up to eight feet. DSMRE issued a violation which Appolo contested, ultimately resulting in a final order allowing the minor highwalls to remain. The Hearing Officer made the following analysis of the issue:

> The parties do not dispute the construction to be given the cited regulations except as applied to highwalls created by settling. In reviewing (citation omitted), it is clear that AOC must be established during reclamation. However, the regulations do not refer to "maintaining" AOC after it is established. Furthermore, no regulation addresses compaction of backfilled material to prevent settling after AOC is initially established. From a fairness perceptive, it would seem logical that the regulation address commonly occurring settling if it was intended that AOC be established and "maintained" until a final release is obtained.

In 1994, OSM issued its own violation, citing the same conditions. On October 29, 1997, Administrative Law Judge David Torbett upheld the violation, and Appolo appealed to

Office of Hearings and Appeals ("OHA") of the Interior Board of Appeals of the Department of Interior. The OHA upheld Judge Torbett by decision of May 28, 1998, whereupon Appolo instituted an appeal in the United States District Court for the Eastern District of Kentucky. That Court affirmed on February 24, 2000.[2]

Neither the District Court, nor the Sixth Circuit gave any real analysis to the question of reemerged highwalls in the context of the Legislative history of SMCRA and the admissions of OSM contained in the record.

The fundamental error of the Court of Appeals as well as the Interior Board of Land Appeals in *River Processing, Inc., v. OSM*, 76 IBLA 129 (1983) is their focus on the possible *means* or *methods* by which the operator can avoid the settled highwall situation. It has been suggested that the backfill could be "overfilled" so that the ultimate settled height of the fill would equal the top of the highwall. More conventional means include the use of compaction, controlled placement, control of particle size, moisture density and the like. Unquestionably, there are methods which can be employed to control or reduce future settlement in earthen fills. Nevertheless, as OSM engineer House acknowledged,

2. The decisions of the District Court and OHA are replete with references to potential landslides, slumps, scarps, fissures, and in general the alleged instability of the backfill. These references relate to an allegation of instability in the fill which pertained only to an isolated area of the permit. In an effort to bring focus upon the issue of highwalls created by settled fill material, Appolo elected not to appeal from that portion of the judgments below which dealt with the instability issue, and accordingly the portent of environmental disaster which these references were intended to suggest has not been brought before this Court.

these are largely impracticable in the surface mining context, which no doubt explains the agency's termination of its rule-making effort on the topic, 56 FR 17480 (April 22, 1991). The question is not "is it possible?" to prevent settled highwalls or "by what method?"; rather, the issue is one of fairness: If the operator is expected to employ *any* means to address the issue, should he not be told *before* undertaking the mining and reclamation rather than *after*? SMCRA simply does not ask the operator to address the issue. There is no provision requiring "permanent" highwall elimination, and the means of accomplishing such a standard were intentionally not included in the Act.

Surface mining reclamation under the Act is not analogous to a "turn-key" contract where the operator is free to conduct the operation in the manner of his own choosing, so long as the end result meets certain criteria. On the contrary, SMCRA requires that the operator submit a highly detailed plan which must demonstrate that, if followed, the end result will achieve every performance standard of the Act, 30 U.S.C. § 1258. The plan is subjected to intense technical review in its every aspect prior to approval. Issuance of the permit constitutes a finding by the regulatory agency that, if followed, the requirements of the Act will be achieved, 30 U.S.C. § 1260. Once underway, mining and reclamation operations must follow the plan and are subjected to frequent, comprehensive inspection. Deviation from the permit will result in violations, 30 U.S.C. § 1271. As Appolo engineer Eugene S. Boston stated "they (OSM) control our lives".

OSM has officially acknowledged, in the proposed rule-making initiated in 1990, 55 FR 14319 (April 17, 1990), that there are no standards incorporated in the regulations or any mining permits to address the issue of settlement of fill

material. In short, while OSM is on the one hand defending *River Processing*, it has never incorporated the rule of that case into the regulatory regime. It does not require any coal operator to address the issue in its mining permit, nor does it do so during the actual mining and reclamation operations. Only after the fact, if the settlement exceeds certain irrational, arbitrarily established and unevenly-applied limits, does the agency take action.

2. The "enforcement policies" OSM applies to re-emerged highwalls have never been subjected to public comment and are not part of the official regulations issued by OSM. The policy employed here against Appolo, the Kentucky "3 foot rule" has no rational basis or reason to support it, according to all of the engineers who testified at the original hearing, including OSM engineer Terry House. This rule simply allows settlement up to three feet and no more, regardless of highwall height. Other enforcement policies laid out in the record allow a certain degree of settlement, either on a "case by case basis" or based upon a percentage of total highwall height. A percentage-based rule is at least logical in that settlement normally occurs at a rate that is relative to the height of the fill. Highwall heights can vary radically depending upon the size of the coal seam and many other factors, and therefore a fixed, across-the-board rule makes no sense. Five miles south of Appolo's mine, in Tennessee, OSM applies a more flexible policy under which the site in question would largely escape further enforcement action.

Several variations of these regulatory policies were identified and included in the record. The first was known as the "Footnote 3 Rule" and arose from settlement of litigation in U.S. District Court for the Eastern District of

Kentucky, Frankfort, styled *National Wildlife Federation v. Mary Helen Miller, Secretary Natural Resources Environmental Protection Cabinet, et al.*, Civil Action No. 86-99, wherein the DSMRE agreed to apply the following standard on interim program sites:

> For sites on the inventory where some highwall remains, but does not exceed six (6) feet or ten (10%) percent of the vertical highwall, whichever is greater, and all other performance standards are in compliance upon inspection (including the requirement that the coal seam be covered with a minium of four feet of non-acid- forming, non-toxic-forming material), no enforcement action will be taken, provided that a current stability analysis of the existing backfill demonstrates that the long-term stability of the backfill is not adversely affected. If these requirements are met, the bond for the area may be released.

President Reagan signed a continuing resolution on December 22, 1987, (P.L. 100-202), Appropriations for Fiscal Year 1988, which specified "the Secretary of Interior shall abide by and adhere to the terms of the settlement agreement in [*NWF v. Miller*] and not take any action inconsistent with the provision of Footnote 3 of the agreement with respect to *any* state or federal program" (emphasis added). Based upon this presidential directive, OSM adopted the following enforcement policy:

POLICY

It is the policy of the Office of Surface Mining Reclamation and Enforcement (OSMRE) to ensure that ten-day notices or enforcement actions are not issued on interim program mine sites *or portions of mine sites where*:

1. backfilling and grading has been completed and revegetation initiated prior to December 22, 1987;

2. any remaining highwall does not exceed the greater of six (6) feet or ten percent (10%) of the total highwall mined;

3. all other performance standards are in compliance upon inspection including the requirement that coal seam be covered with a minimum of four (4) feet of non-acid-forming and non-toxic-forming material; and,

4. *the permittee is informed of the need for* and provides a current stability analysis which demonstrates that the long term stability of the existing backfill and remaining highwall will not be adversely affected. Such stability analysis shall be certified by registered professional engineer. (Emphasis supplied)

Appolo argued that this policy should have at least applied to increments 1 through 5 of its permit which would

have eliminated most of the alleged highwall violation.[3] OSM contends that Footnote 3 applies only to Interim Program Sites, even though the wording of the policy and the presidential directive allows broader application. In 1989, OSM adopted another enforcement policy which was rescinded after only four months. It read as follows:

> 4. *Policy/Procedures.*
>
> (a) *Background.* Section 515(b)(3) of the Act and section 816.102(a)(2) of the regulations (under backfilling and grading: general requirements) require the elimination of all highwalls. Section 519(c)(1) of the Act and 800.40(c)(1) of the regulations specify that an operator may have up to 60% of his bond released upon completion of backfilling, regrading, and drainage control. Section 519(c)(3) of the Act and Section 800.40A(c)(c) of the regulations provided that a bond may be fully released only after extended liability period or revegetation has expired and all reclamation requirements have been met. *An issue arises when settlement occurs between the time of phase 1 and phase 3 bond release, and such settlement leaves some portion of highwall exposed at the termination of the period of extended liability.*
>
> (b) *Policy.* When a permittee has received a phase 1 bond release, it is on the basis that he

3. Although OSM identified one location where settlement had occurred to a height of fifteen feet, the average was less than ten feet, which would in all cases be less than ten percent of the total highwall mined.

> has complied with backfilling and grading requirements. The period of extended liability contained in Section 515(b)(20) of the Act is expressly for revegetation and attainment of the postmining land use, as is the 2 year period of extended liability in 30 CFR 715.20(f)(2) of the regulations. Even in well constructed backfills, some settlement over time should be expected and allowed. Such settlement should be planned for in the permit application and accommodated in the plan for backfilling and regrading. *However, subsequent settlement of approved, stabilized, and well revegetated fills that does expose a small portion of the highwall generally should not constitute a basis for requiring the additional disturbance associated with remedial backfilling and grading.* However, in situations where the settlement interferes with achievement of the postmining land use, or is associated with slumping or other indications of instability, requiring remedial regrading to correct those problems and eliminate any wall exposed through settlement would be appropriate. (Emphasis added).

At the time of the hearing before Judge Torbett, a then-current OSM directive was introduced which stated that "after phase I bond release, any backfill settlement will be evaluated on a case-by-case basis in accordance with existing settlement policy". None of the witnesses at the hearing could articulate, however, what the "existing settlement policy" was.

3. The Kentucky 3-foot rule was applied by OSM in this case because the site falls within the jurisdiction of the

Kentucky DSMRE. That is, OSM has approved Kentucky's program for "primacy" under the Act, allowing the state to serve as OSM's proxy in implementing the Act. The Kentucky program includes an administrative review process approved by OSM and a state counterpart to each component of the federal program. Following a full administrative hearing on the merits, a final order of the Kentucky DSMRE imposed no penalty and allowed the small highwalls to remain, based upon the rationale of the hearing officer quoted, *supra* at 8. The same facts which gave rise to the Kentucky enforcement action prompted initiation of the current case by OSM in 1994. Appolo argued that this earlier adjudication should have had preclusive effect as to any future enforcement action based upon the same conditions, citing *res judicata* and further upon the grounds that OSM's action exceeds the precisely defined contours of its oversight jurisdiction. Specifically, OSM is not to proceed unless the state's failure to act is "arbitrary, capricious, or an abuse of discretion under the state program". Moreover, a state has "good cause" for failure to act wherever its regulatory authority is "precluded from acting on the possible violation by an administrative order, where that order is based on the violation not existing . . .". The original administrative order of the DSMRE was tantamount to such a finding, and under DSMRE regulations, precluded that agency from taking any further action. However, instead of resolving Appolo's liability, the company derived no benefit whatever from the decision, as it was completely ignored by OSM, thus subjecting Appolo to the type of dual, conflicting enforcement which was not intended under the Act.

REASONS FOR GRANTING THE WRIT

The Petition should be granted in order that the Court can correct a fundamental error of interpretation on the part of OSM which affects a major portion of the nation's coal industry.

In addition, enforcement of conflicting and concededly irrational "enforcement policies" rather than properly promulgated regulations, is such an egregious violation of substantive due process as to warrant this Court's intervention.

I. THE COURT OF APPEALS RULING PERPETUATES AN ERRONEOUS INTERPRETATION OF SMCRA WHICH ADVERSELY IMPACTS A MAJOR PORTION OF THE NATION'S COAL INDUSTRY.

The Coal industry remains an important component of the nation's energy supply. Approximately fifty percent of the electricity used in the continental United States is generated from the use of coal. A large percentage of this coal is mined in the mountainous Appalachian region of Kentucky, West Virginia, Pennsylvania, Ohio and Tennessee. The rule of *River Processing* as applied in this and other cases by OSM has a significant impact on these coal operations, by imposing unnecessary and costly reclamation in instances were environmental concerns alone do not warrant any further action. The site in question is no longer even under the jurisdiction of DSMRE, having received final bond release during the pendency of this action.

The origin of the misinterpretation lies in SMCRA's requirement that the highwalls be "completely" eliminated. No doubt this language was used in order to clearly reject alternative proposals which had been forcefully debated during the years preceding enactment. Of course, those debates centered around whether the operator would ever be required to eliminate highwalls, *in the first instance*. The issue of future shrinkage of the fill material, due to consolidation, was simply not addressed. However, it is plain that (1) the Congress was aware that any earthen fill would tend to settle, and (2) it deliberately omitted any requirement that the operator address such settlement. Stability is to be achieved for the long term, however, complete highwall elimination is not.

The primary means in which one would address future settlement would be by compaction of the spoil material as it is laid down in "lifts" (layers). This reduces the air voids, thus reducing the amount of future settlement. The Act expressly does not require compaction, however, except as may be necessary to ensure stability or to prevent leaching of toxic materials. It was on this point that the board in *River Processing* stumbled, as revealed in the following quote:

> While the settling of backfill material is not mentioned in 30 CFR 715.14, there is certainly a mandate for an operator to take it into account implied in the language of that section: "in order to achieve the approximate original contour, the permittee shall . . . transport, backfill, *compact* (where advisable to ensure stability or to prevent leaching of toxic materials), and to grade all spoil materials to eliminate all highwalls". (Emphasis in original).

Contrary to the above quoted rationale supporting the *River Processing* holding, OSM has expressly acknowledged that the operator is *not* required to take into account future settling of backfill material. In its proposed rule making, on technical standards for backfilling and grading requirements, 55 FR 14319 (April 17, 1990), the agency acknowledged that Congress had not addressed the issue:

> While the disposal of excess spoil material and coal waste products are not exactly the same as backfilling against a highwall, there are similarities. . . . There are, however, great differences in the requirements Congress applied to the disposal of excess spoil and coal mine waste and the return of spoil against a highwall. Excess spoil and coal waste have placement and compaction requirements, while spoil backfilled against the highwall has no specific placement requirements, and compaction only where advisable to ensure stability and prevent leaching, *id.*, at 14320.

Indeed, the OSM was considering several requirements to address the problem of backfill settlement including specifying a certain degree of compaction as well as limiting lift thickness, acknowledging that "presently fills may be constructed in a single lift if the stability is certified", *id*, at 14321.

Thus, OSM has never followed the rule of *River Processing*, yet it is defending the decision here. The rationale of OSM and the Board seems to be that, while there are no performance standards or requirements imposed in the permitting or during the mining and reclamation, the operator

is nevertheless supposed to know that highwall elimination is a requirement, and that it must be permanently achieved. The problem with this line of thinking is that it runs contrary to the way in which SMCRA is written and enforced. If the requirement to prevent settled backfill is indeed a component of SMCRA, then it is unique in that it is the only performance standard about which OSM says nothing until all operations on the permit are complete. This cannot be the law.

A Writ of Certiorari should be granted to correct this unfair and wrong-headed approach from being applied to an important industry.

II. THE INCONSISTENT AND IRRATIONAL "ENFORCEMENT POLICIES" APPLIED BY OSM HAVE CREATED A BREACH OF DUE PROCESS WARRANTING INTERVENTION BY THIS COURT.

Not only is OSM enforcing its unwritten backfill settlement performance standard on an "after-the-fact" basis, there is no duly promulgated regulation fairly apprising the operator of what is expected of him. Rather, the agency has proceeded according to a series of policies which are the product of the agency's fundamental misinterpretation of the Act. Clearly whether a particular condition constitutes a violation depends upon the happenstance of timing and political boundaries, as illustrated by the following testimony of OSM engineer House:

> Q: Now, you indicated that Footnote 3 has expired. I don't know if you've since learned when it expired, but does that mean that whether an operator gets a violation just

> depends on when the inspector happens to come on this permit, whether it is before the expiration of Footnote 3 or after?
>
> A: The policy rescission procedures are to be used by all of the inspectors. They are to know when these policies apply and when not to apply. So in answer to your question, when someone comes on the job, they are to already know what the policy is at that time.

The inspector may know what the policy is on a given day, but what about the operator? This type of enforcement cannot be fair or constitutional when the operator has but one opportunity to construct the backfill, which in this case was a three year, multi-million dollar undertaking.

OSM's enforcement actions must be judged by whether they are "arbitrary, capricious or otherwise inconsistent with the law", 30 U.S.C. § 1276(a)(1). Putting aside the fact that an operator might be subjected to different standards at different times and places, OSM has approved and enforced a DSMRE rule which is concededly irrational. There is no rationale for the Kentucky 3 foot rule. "An agency rule that is *rational*, based on consideration of relevant factors, and within the scope of the authority delegated to the agency by statute", will not be set aside, *Motor Vehicle Manufacturers Association v. State Farm*, 463 U.S. 29, 42 (1983). Conversely, an irrational rule *should* be set aside, as it is necessarily arbitrary. Where, as here, the agency is acting without the rule making process, its actions should be subject to greater scrutiny and afforded a lesser degree of deference.

III. DUE PROCESS DEMANDS THAT OSM RESPECT RESULTS OF LITIGATION IN AN APPROVED STATE ADMINISTRATIVE REVIEW PROCESS.

In the present case, OSM has re-litigated the same facts, issues and claims which were fully litigated and finally decided in the DSMRE proceeding of 1990. This case makes it plain that OSM believes it must re-litigate every case in which the state agency receives an adverse ruling. The Court should intervene to save OSM from itself, and free the coal industry from such oppressive and overzealous enforcement.

Once a state has been granted primacy under the Act, OSM is not directly involved and should not intervene unless there is an abuse of discretion, *In Re: Permanent Surface Mining Regulatory Litigation*, 653 F.2d 514, 518, 523 (D.C. Cir. 1981). As OSM itself has stated, the oversight rule "must be based on respect for the role of the states". Deficiencies can be corrected at the program level, "without placing the mine operator in the middle of conflicting orders from state and federal officials", 53 FR 26728, 26731 (July 14, 1988), *Preamble to Final Rule, Evaluation of State Responses to Ten-Day Notices*. The agency's discussion of this issue preceding its final rule, *id.*, makes it plain that OSM is not to intervene every time there is a ruling with which it disagrees, yet that seems to be the case. This is unfair to Appolo and the industry. An operator should be able to depend upon a final ruling from the approved state agency as having resolved his liability. Moreover, in spite of Sixth Circuit and IBLA decisions to the contrary, there is no reason that OSM should not be subject to the principals of *res judicata* and collateral estoppel, where the elements for their application are present. The present case is such an instance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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